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IMPROVING MULTIDISTRICT LITIGATION: THE CASE FOR THREE-JUDGE PANELS

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TABLE OF CONTENTS

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IMPROVING MULTIDISTRICT LITIGATION: THE CASE FOR THREE-JUDGE PANELS

INTRODUCTION

Today, like no other time in history, civil litigation in the federal courts is concentrated in multidistrict litigation (MDL). A procedural device approved by Congress in 1968 for the pre-trial consolidation of individual actions sharing at least one common question of fact, the MDL statute has been invoked in recent years with a frequency not likely contemplated by those judges and lawmakers who conceived of the law more than five decades ago. Much of the recent increase in activity involves mass torts, although non-tort litigation has also seen an increase in MDL consolidation. And while this device offers clear benefits—mainly more efficient use of finite judicial resources, consistency in pre-trial rulings, and avoidance of repetitive discovery—those have not been achieved without cost or controversy, especially of late.

Presently, hundreds of MDL proceedings, composed of hundreds of thousands of individual lawsuits, are active in the federal courts. Overwhelmingly, the majority of these actions are concentrated in a handful of MDLs presided over by a small number of district court judges. Non-party litigation financiers and aggregators have fueled the recent growth of the largest of these MDLs. Too, these MDLs operate to no small degree outside the strictures of the Federal Rules of Civil Procedure, embracing a variety of often *ad hoc* case management techniques. Once transferred to an MDL

these cases are rarely remanded to their originally-filed jurisdictions for trial as MDL courts almost invariably press for global settlement in an effort to relieve the federal court system of these litigation logjams. Increasingly too, evidence has revealed that the *ad hoc* procedures adopted by many MDL courts permit, if not promote, the filing of large numbers of meritless claims.

Against this backdrop, many have called for MDL reform. For example, last year Lawyers for Civil Justice submitted a request for rulemaking to the Advisory Committee on Civil Rules proposing a number of rule revisions aimed at establishing greater procedural uniformity and "bringing MDL cases back within the existing and well-proven structure of the FRCP."[1] Proposed reforms include requirements for simple, early-stage evidentiary proffers by plaintiffs, opportunities for interlocutory appeal of key rulings, disclosure of third-party litigation funding, and limitations on multi-plaintiff joinder, among others. These reforms would promote not only greater procedural predictability in MDL actions, but also resolution of claims on the merits.

Yet, one proposal for reform has so far drawn virtually no attention—multi-judge MDL case management. This reform would largely preserve the efficiencies

[1] Request for Rulemaking to the Advisory Committee on Civil Rules, Rules for "All Civil Actions And Proceedings": A Call to Bring Cases Consolidated for Pretrial Proceedings Back Within The Federal Rules of Civil Procedure, Aug. 10, 2017, at 2; *see also* Malini Moorthy, "Gumming Up the Works: Multi-Plaintiff Mass Torts," U.S. Chamber Institute for Legal Reform, 2016 Speaker Showcase, The Litigation Machine, http://www. instituteforlegalreform.com/legal-reform-summit/2016-speaker-showcase; *cf.* Charles Silver & Geoffrey P. Miller, *The Quasi-Class-Action Method of Managing Multidistrict Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 111 (2010) (opposing current MDL practice as unfair to plaintiffs, making plaintiffs' lawyers financially dependent upon judges, compromising judicial independence).

realized under the current system of single-judge MDL assignment (with minimal added cost in judicial resources) and help to achieve a balanced, more rigorous result in these cases, results arguably better for everyone involved. Multi-judge MDL management would also efficiently address the desire for interlocutory appeal of key MDL rulings without having to modify existing rules or the MDL statute.

This model has in fact been successfully implemented in the tobacco products liability cases pending in the United States District Court for the Middle District of Florida. With that as object lesson, in the face of concerns about excessive burdens upon and power vested in MDL judges, the JPML should consider convening three-judge courts to manage the largest MDL proceedings.

I. MULTIDISTRICT LITIGATION TODAY—MASSIVE CONCENTRATION IN THE HANDS OF A FEW

This degree of concentration in multidistrict litigation is a relatively recent phenomenon. "As recently as a decade ago . . . [MDL proceedings were] second banana compared to the class action."[2] At least as it relates to mass torts, two factors acted to more or less put an end to the prosecution of claims through the mechanism of a class action. The first involved the U.S. Supreme Court's rejection of settlement classes in asbestos cases under Federal Rules of Civil Procedure 23(b)(3) and

[2] Andrew D. Bradt, *A Radical Proposal: The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 833 (2017)(MDL characterized at one time as "an obscure device or as a 'disfavored judicial backwater'").

23(b)(1)(B).[3] The second was the passage of the Class Action Fairness Act, which expanded the jurisdiction of federal courts over class actions filed in state courts.[4]

As the sun began to set on the class action, attention shifted to multidistrict litigation. In effect, MDL consolidation represents a form of *de facto* class treatment absent the requirements of class certification. Representativeness, predominance, and superiority, the *sine qua non* of class certification, are no longer relevant requirements. Rather, the principal requirement for an MDL is that the cases have "one or more common questions of fact."[5] Although the MDL statute also requires that transfer serve the convenience of the parties and witnesses, this is a secondary consideration that arguably speaks as much to the issue of where as it does to the issue of whether consolidation takes place. And while consolidation must also "promote the just and efficient conduct" of the actions, such a requirement is often little more than an afterthought once the number of cases reaches a critical mass. Notably too, unlike class action procedure, one cannot opt-out of MDL transfer.

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[3] *Ibid.* The referenced cases are *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591**,** 622-25 (1997) (affirming reversal of a judgment approving a class settlement on the ground that the case could not properly be certified under Rule 23(b)(3)) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864-65 (1999)(reversing the approval of a settlement on the ground that the case could not properly be certified under Rule 23(b)(1)(B)).

[4] *Ibid; see also* Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation after* Ortiz, 58 U. KAN. L. REV. 775, 776 (2010).

[5] Multidistrict Litigation, 28 U.S.C. § 1407(a) (2006).

In June of 2014 approximately 36% of all civil cases pending in the federal courts were pending in one or more MDL proceedings.[6] By comparison, in 2002, cases pending in one or more MDLs represented 16% of the total.[7] At present, 226 MDL proceedings, each assigned to a single federal judge, are active in the federal courts.[8] Of these 226 MDLs, 19 have more than 1,000 cases. These 19 MDLs are pending before 16 district court judges.[9] Indeed, one judge, Judge Joseph Goodwin of the Southern District of West Virginia, has responsibility for 6 separate MDLs totaling nearly 25,000 pending actions predicated on claims of personal injury from the use of defendants' products in pelvic surgery on women.[10] More than 120,000 individual claims are active in these MDLs, although at their peak these 226 MDLs contained nearly 470,000 claims.[11]

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[6] MDL STANDARDS AND BEST PRACTICES, at x-xi, https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf (Duke Law Ctr. for Judicial Studies Sept. 2014). If prisoner and social security civil litigation is removed from the total number of federal cases, the number pending in MDL proceedings increases to almost 46%.

[7] *Ibid.* Whatever this may mean for litigants, perhaps the primary beneficiaries are the district courts whose dockets are thick with these cases. As one commentator put it, "for judges, the power of MDL to vacuum thousands of cases filed nationwide into one courtroom carries significant docket clearing benefits." *See* Bradt, *supra* note 2, at 836.

[8] *See* MDL Statistics Report - Distribution of Pending MDL Dockets by District, http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-February-15-2018.pdf.

[9] *See ibid*.

[10] *Ibid.*

[11] *See ibid.* The JPML data do not reveal the manner of disposition of the roughly 350,000 claims that were once pending in these 226 MDL proceedings. Certainly, a number were dismissed, voluntarily or involuntarily. Many more were likely settled.

II. CASE MANAGEMENT, SETTLEMENT, AND THE MAGNIFIED EFFECT OF THE MDL COURT'S RULINGS

Whenever lawyers crowd into a courtroom, divergent interests emerge, demanding the court's attention and testing its case management skills, as the JPML itself has recognized: "Managing an MDL fundamentally is no different from managing any other case, except that an MDL usually has the added complexity of more moving parts—lawyers, parties, jurisdictions, choice-of-law issues, varieties of discovery, and differentiated claims, just to mention a few. *Any one of these factors can present you with serious challenges.*"[12]

Many MDL judges would find the JPML's trailing comment an understatement. Notwithstanding checklists and other guidance in the MANUAL FOR COMPLEX LITIGATION or assistance from designated lead counsel, managing an MDL—on top of an MDL judge's already busy docket of criminal and civil cases—is a daunting task, far more complex than managing a single case precisely because of the greater number of moving parts. The Honorable Timothy J. Corrigan of the Middle District of Florida, presiding over the tobacco products liability cases removed to that court, put it this way: "these cases represent four additional years of civil case filings, . . . a huge number of cases for us to . . . try to be dealing with on top of our criminal and civil

[12] TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES, at 3 (Fed. Jud. Ctr., 2nd ed. 2014)(emphasis added). It is noteworthy that the JPML elected to publish a guide to MDL case management, suggesting that MDL judges were in need of greater guidance in this area than they were able to obtain from the MANUAL ON COMPLEX LITIGATION.

case load."[13]

These ongoing case management challenges and the prospect of having to actually try a large number of these cases combine to bring pressure on MDL courts to push the parties toward global settlement, usually as early as possible. Contrary to the statutory mandate that each case "shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred,"[14] remand is a rare occurrence:

> [A]s MDL practice flourishes, many cases are transferred out of their home courts and away from local juries, but few—very few—ever return for trial. . . . The *Manual for Complex Litigation* seems virtually to command this result . . . 'One of the values of multidistrict proceedings is that they bring before a single judge all of the federal cases, parties, and counsel comprising the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement. . . . *As a transferee judge, it is advisable to make the most of this opportunity and facilitate the settlement of the federal and any related state cases.*' Thus, it is almost a point of honor among transferee judges . . . that cases so transferred shall be settled rather than sent back to their home courts for trial.[15]

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[13] *See* Transcript of Proceedings, *In re Engle Cases*, No. 3:09-cv-10000-J-WGY-JBT, at 7, Dec. 7, 2010, ECF No. 31. At a case management conference held 18 months later, Judge Corrigan opened the hearing with the following comments: "We are here about the continuing business of trying to manage these cases, which have presented quite a challenge for our court and for our division. These judges have all stayed with us, and we are all working on it and doing the best we can. So today is the day for us to have some further discussions about ongoing management of not only the cases that are to be tried in the short term, but also the cases which need to be tried in the long term and what case management strategies are appropriate." Transcript of Proceedings, *In re Engle Cases*, No. 3:09-cv-10000-J-WGY-JBT, at 4, June 18, 2012, ECF No. 677.

[14] *Supra* Multidistrict Litigation, note 5.

[15] *DeLaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 151 (D. Mass. 2006) (Young, J.) (citations omitted); *see also* Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review In Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1670 (2011)("The potential remand creates a further incentive to be perceived as the hero who resolved the disputes rather than the ineffectual

Aside from wrestling with unusual and imposing case management challenges, as well as the ever present allure of global settlement, the judge managing a large MDL, especially a mass tort, often confronts complex scientific or technical disputes. Often heavily expert-dependent, these cases raise the almost certain prospect of multiple challenges under Rules 702 and 703 of the Federal Rules of Evidence.[16] To prepare for such challenges, MDL courts may invite tutorials on the relevant science, engineering, or medicine, although these proceedings usually offer only an introduction to what is necessary for evaluating the evidence. Any number of other equally serious legal issues arise in MDL proceedings that test the court's knowledge, resources, and analytical skills. These include disputes over jurisdiction, class certification, and federal preemption to mention only a few. These decisions often are outcome-determinative in large numbers of cases. There is enormous pressure, therefore, to get these decisions right insofar as they have the potential to affect thousands of claims, involving massive, potentially devastating aggregate liability.

At the same time, commentators have decried the power conferred by transfer of thousands of cases to a single judge.[17] Such concentration is contrary to the

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colleague whose inability to achieve a settlement left her fellow trial judges with the task of trying each case individually.").

[16] *See In re Engle Cases,* No. 3:09–cv–10000–J–32HTS, 2009 WL 9119991 at *7, n. 6, (Nov. 27, 2009)(noting that during the class action trial the parties introduced testimony from a total of 14 experts on the subject of causation alone).

[17] Pollis, *supra* note 15, at 1648.

concept of decentralized judicial authority, and it not only permits control over the rights of thousands of claimants and the consequent ability to bring the parties to the negotiating table, but also carries the disproportionate ability to affect the development of the law.[18] As a check on the exercise of this power, these commentators have argued for mandatory interlocutory review of certain trial court rulings, notwithstanding the delay such review could cause in the progress of the MDL cases. The trade-off, it is claimed, is worth it: "[T]he benefits for the litigants, for both the evolution of the law and the public's confidence in the judicial system would far outweigh [the costs]."[19]

Yet, these same benefits are achievable without pausing or slowing the progress of the MDL proceedings in aid of appellate review and without the need to expand appellate jurisdiction, by convening a three-judge district court to preside over the multidistrict litigation in the first instance. Such a procedure would permit the judicial case-management burdens to be shared, would diminish the power of any one judge, and would foster an appellate-style development of the law governing the critical issues in the litigation.

[18] Pollis, *supra* note 15, at 1648 ("A single trial-court decision can implicate hundreds, or even thousands, of individual lawsuits. As a result, MDL decisions can have an exaggerated influence both for the parties to MDL proceedings and for the evolution of the law.")

[19] Pollis, *supra* note 15, at 1648.

III. THREE-JUDGE DISTRICT COURT—HISTORY AND RATIONALE

In 1910, Congress passed the Three-Judge Court Act[20] in response to concerns over the Supreme Court's approval of the authority of a single federal judge to enjoin a state's enforcement of an unconstitutional law.[21] The law mandated a court consisting of three judges whenever a party sought to enjoin a state law on constitutional grounds. Later, Congress expanded the Three-Judge Court Act to require three-judge courts in cases seeking to enjoin *federal* laws on constitutional grounds. The Act also incorporated a provision for direct appeal to the U.S. Supreme Court to ensure expeditious appellate review. In 1976, Congress eliminated three-judge district courts and direct appeal therefrom except in cases of legislative gerrymandering.[22]

Today, the Three-Judge Court Act is codified at 28 U.S.C. § 2284 and requires the appointment of a three-judge panel in the district court "when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."[23] Another specific federal statute that requires a three-judge district court is the Bipartisan Campaign Reform Act of 2002, out of which arose the Supreme

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[20] *See* Act of June 18, 1910, ch. 309, § 17, 36 Stat. 539, 557.

[21] *See Ex Parte Young*, 209 U.S. 123 (1908).

[22] *See* Michael E. Solimine, *Congress,* Ex Parte Young*, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 139-142 (2008).

[23] Three-Judge Court Act, 28 U.S.C. § 2284(a) (2012).

Court's controversial decision in *Citizens United v. Federal Election Commission*.[24] Legislative redistricting and campaign finance lie at the core of the democratic process. It is not too difficult to understand, therefore, that Congress might choose to deviate in such an instance from the usual, single-judge forum for civil adjudication. Were the constitutionality of the boundaries of a legislative district to be decided by one judge, whose political inclinations could intrude—consciously or not—the result would be unsettling to many regardless of the outcome. But, the same decision by a panel of three judges would be much less so.

As one commentator described it:

> [t]hree judges lend the dignity required to make such a decision palatable. The . . . extraordinary nature of the procedure show[s] that the federal courts recognize that important and delicate interests are at stake. More importantly, the presence of three judges also ensures greater deliberation with less chance of error or bias."[25]

The commentator notes further that while "two judges out of a panel of three may be mistaken or even prejudiced, it is more possible that a single judge may be; and if the mistake is an honest one, even one clear-eyed judge among three may be able to forestall a bad decision."[26]

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[24] 558 U.S. 310 (2010).

[25] David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 7 (1964).

[26] *Id.* at 7-8; *see also Swift & Co. v. Wickham,* 382 U.S. 111, 119 (1965)(three judge district court procedure "allow[s] a more authoritative determination and less opportunity for individual predilection in sensitive and politically emotional areas").

Assignment of three judges to preside over litigation of considerable size or import allows for a more deliberative dynamic, one likely to produce fewer extreme, unusual, incorrect, or even unfair results. The three-judge court will also provide for a more rigorous, thoughtful, diversely influenced outcome, more likely to withstand reviewing court scrutiny. Another commentator describes the benefit in plain, even common-sense terms:

> The answer, almost taken for granted, derives from the idea that two or more heads are better than one. . . . All relevant considerations are more surely recognized and taken into account when more than one person is charged with identifying and bringing them forward. . . .The sum total of group thought, activated by collective responsibility, is apt to be more reliable than the thinking of single individuals in most instances.[27]

Beyond this, public confidence in the process and the outcome is likely to be enhanced in a multi-judge scenario: "Public confidence in judicial integrity is part of the demand. Knowledge that multiple judges check each other helps to sustain confidence and to protect individual judges from public criticism. The solemn dignity of learned judges listening and conferring together engenders public confidence."[28]

Opponents may object to convening a three-judge court for MDL proceedings because it would impose a burden on the judiciary greater than the single-judge MDL

[27] Robert A. Leflar, *The Multi-Judge Decisional Process*, 42 U. MD L. REV. 722, 722-23 (1983). The commentator was addressing the rationale for three-judge panels in the appellate phase of litigation. The logic, however, applies equally to the functioning of a three-judge district court.

[28] *Id.* at 723.

system. In addition, some may perceive the litigation before three judges would necessarily proceed at a slower pace. The first concern is dubious and in any event should be balanced against the concern for an individual judge's ability to manage the burden of a mass tort or other large MDL. At present, of the 226 active MDLs, 19 have more than 1,000 cases. These 19 MDLs are pending before 16 district court judges.[29] Assuming a 1,000-action threshold for convening a three-judge MDL, these MDLs would require the involvement of 32 additional district court judges out of the 600 or so judges currently sitting.[30] That number by itself seems hardly imposing or discouraging of the use of three-judge panels in mass-tort or other large MDLs. Any concern that a three-judge court would necessarily slow the progress of the litigation is equally suspect. Whatever delay might attend a three-judge district court, it almost surely would be minor compared to the delay caused by interlocutory review.[31]

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[29] *See* MDL Statistics Report, *supra* note 8.

[30] The precise number of district court judges sitting at any one time is difficult to determine because vacancies can occur at any time and appointments fill them whenever the political process responds. At present, Congress has authorized 677 Article III district court judgeships. *See* http://www.uscourts.gov/sites/default/files/districtauth.pdf.

[31] In the event of interlocutory review, the trial court proceedings would not necessarily grind to a halt. As much as possible, most judges would insist that the parties carry on with those aspects of the litigation not related to the issue on appeal. Nevertheless, since nearly all interlocutory appeals, whether discretionary or of right, involve matters that either Congress or individual judges have determined are of sufficient weight that they demand the immediate attention of a reviewing court, in almost every appeal some aspect of the trial court proceedings will likely have to wait for a decision from a court of appeals. Delay due to appeal, in other words, in some degree seems inevitable.

IV. STATUTORY AUTHORIZATION IN THE MDL CONTEXT AND IMPLEMENTATION

Notably, the statutory authority for the appointment of multiple judges to preside over an MDL already exists. The MDL statute, 28 U.S.C. § 1407, establishes the procedure for MDL transfer, investing the JPML with authority to act when it will serve "the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."[32] As drafted, the MDL statute contemplates transfer of actions for consolidated treatment to "a judge or judges:"

> Such coordinated or consolidated pretrial proceedings shall be conducted by *a judge or judges* to whom such actions are assigned by the judicial panel on multidistrict litigation. . . . With the consent of the transferee district court, such actions may be assigned by the panel to *a judge or judges* of such district. The *judge or judges* to whom such actions are assigned.[33]

The repeated reference to "judge or judges" in the statutory text clearly indicates that the JPML has the authority to assign MDL actions to more than one judge for consolidated proceedings. No further statutory authorization or rulemaking should be necessary.

As for the criteria justifying a three-judge court, the number of cases should be the dominant factor in the Panel's decision to assign more than one judge. The more cases, more lawyers, more jurisdictions, more individual issues demand attention, and

[32] Multidistrict Litigation, 28 U.S.C. § 1407(a). Subsection (f) of the statute furthermore gives the JPML authority to establish its own rules of procedure.

[33] Multidistrict Litigation, 28 U.S.C. § 1407(b) (emphasis added).

more third parties assert their interests, all adding to the complexity of the litigation. While a bright-line threshold is harder to determine, most would likely agree that a multi-judge court should be required at 1,000 cases, depending, perhaps, on the maturity of the litigation. In other words, an MDL that reaches this threshold very late in the process, after several years of litigation, may be too far along to benefit from a three-judge assignment. Less than 200 actions would likely not merit more than the traditional single judge assignment. Between these boundaries lies a large area for the exercise of discretion.

Of course, no MDL consists of thousands of cases when initially established. Rather, only after some period of time, with the filing of tag-along actions, does the number rise above the likely threshold for multi-judge assignment. Initially then, unless rapid scaling is anticipated, the JPML will assign one judge adding other judges as the litigation grows.[34] This process would seem a matter suited for the JPML's rules of procedure. In addition, while there may be advantages to assigning judges from the same district, that should not be a limiting factor. Most courts have access to videoconference capabilities permitting judges in distant locations to participate fully in proceedings.

[34] This was in fact the experience with the Middle District of Florida's *Engle* docket. Initially, Judges Corrigan and Marcia Morales Howard presided jointly. They were later joined by Judge Roy B. Dalton, Jr. and later still by Judge William G. Young. That all judges were not on board on day one did not seem to adversely affect the functioning of the court or impair the benefits of multi-judge case management.

Secondary to the number of claimants, other factors contributing to complexity may call for multi-judge MDL assignment, such as litigation involving leading-edge technical or scientific evidence, litigation involving novel or a broad range of theories of legal liability, claims heavily dependent upon experts from a variety of disciplines, as well as litigation involving claims by multiple categories of third-parties. The Panel should have the discretion to take these non-numerical factors into consideration in appointing additional judges to the MDL court.

V. THE MULTI-JUDGE COURT IN MASS TORT LITIGATION—*IN RE ENGLE CASES*

When the Florida Supreme Court decertified the *Engle* class of plaintiffs seeking recovery for personal injuries against various tobacco companies, it granted the class members one year in which to file individual actions. Thousands did so by way of multi-plaintiff joinder. Defendants removed many of these cases to federal court. Approximately 3,700 actions brought by 4,432 plaintiffs were pending in the Middle District of Florida.[35] That litigation provides some valuable lessons in multi-judge case management.

Confronted with a mass tort much like an MDL, judges of the Middle District of Florida decided *sua sponte* that three jurists, not one, would jointly assume responsibility for pretrial case management. Later, Judge William G. Young from the

[35] *See In re Engle Cases*, No. 3:09-cv-10000-J-WGY-JBT, 2017 WL 4675652, at *3-*5, (M. D. Fla. Oct. 18, 2017).

District of Massachusetts joined them to assist with the trial of the cases that were not disposed of pretrial. In every respect save one, the federal *Engle* cases had all the essential characteristics of a mass tort MDL.[36]

The judges recognized that the *Engle* cases pending in the Middle District of Florida presented "a formidable case management challenge."[37] Regarding the rationale for multi-judge case management, the court's orders indicate that the sheer volume of claims was the chief, if not sole, reason:

> Because of the large size of the federal *Engle* docket, the then three active district judges of the Jacksonville Division of the United States District Court for the Middle District of Florida jointly managed these cases. We were later joined by the Honorable William G. Young of the United States District Court for the District of Massachusetts, sitting by designation.[38]

In addition, at an earlier stage of the *Engle* proceedings, the court intended to divide the number of actions equally among three judges.[39] Given that each would then be responsible for more than a thousand actions similar to those pending before other judges of the same court, it likely stood to reason that these judges should coordinate their case management efforts. The court solicited input from the parties on how

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[36] Ironically, several defendants moved the JPML for MDL treatment of these cases, which was denied. *See In re Engle Progeny Tobacco Products Liability Litigation*, No. MDL 1887, 2007 WL 4480080, at *1 (J. P. M. L. Dec 12, 2007).

[37] *See In re Engle Cases*, No. 3:09-cv-10000-J-WGY-JBT, First Omnibus Engle Order, Dec 22, 2010, ECF No. 42.

[38] *See In Re Engle Cases*, *supra* note 35 at *1.

[39] *See In Re Engle Cases*, *supra*, note 16 at *31.

best to manage the huge docket. In response, the parties recommended various procedures, some of which the court adopted, aimed at advancing the mass of cases to resolution consistent with the requirements of due process.[40]

What may also have influenced the judicial thinking toward joint case management is the one issue that distinguished these cases from a typical MDL, that is, these cases would remain in the Middle District of Florida through final disposition. Given that very few MDL cases are ever remanded, however, this may be a distinction without a difference. But remand to other district courts was not even a theoretical option in the *Engle* cases.[41] Surely, this influenced the decision to divide the actions among three judges. Left with no statutory escape hatch, the judges of the Middle District of Florida likely saw joint management as not only rational, but essential.

[40] It is instructive to note that one case management technique employed early in the *Engle* proceedings was to weed out cases that were not viable for various reasons: cases that were time-barred, plaintiffs had lost interest, etc. This effort resulted in the dismissal of hundreds of the originally filed cases. *See* Transcript of Proceedings, *In re Engle Cases*, No. 3:09-cv-10000-J-WGY-JBT, June 8, 2011, ECF No. 171. Later, the four judges signed an order imposing a $9.1 million sanction on two plaintiffs' counsel for numerous violations of Rule 11 and 28 U.S.C. § 1292 including filing personal injury actions in the name of more than 588 plaintiffs deceased at the time of filing, objecting to and resisting the court's efforts to discover the status of these plaintiffs' claims through a questionnaire process, pursuing claims that were known to be time-barred, filing actions on behalf of a number of plaintiffs who had never authorized actions to be filed on their behalf, and prosecuting actions on behalf of plaintiffs who had no injury. *See In Re Engle Cases*, *supra* note 35. *See also* Glenn G. Lammi, *Court Order Imposing $9 Million Sanction Paints Sordid Tale of Ethically-Challenged Lawyering*, WLF LEGAL PULSE, Nov. 2, 2017, https://wlflegalpulse.com/2017/11/02/court-order-imposing-9-million-sanction-paints-sordid-tale-of-ethically-challenged-lawyering/.

[41] Here, remand is used in the sense of remand to a transferor federal court as contemplated under 28 U.S.C. § 1407(a). Some of the plaintiffs in *In re Engle Cases* may not have been residents of the Middle District of Florida, and thus it is possible that a limited number of these cases could have been transferred at some point to plaintiffs' home jurisdictions.

Whatever the motivation, most relevant for present purposes is whether this form of case management was effective. On that question, what emerges from the orders and transcripts of proceedings is a fascinating display of trial-court judicial collaboration, with each judge weighing in to varying degrees on the extant substantive and procedural issues before the court.[42] For example, at one case management conference, after 36 pages of back and forth dialogue between the three judges and counsel regarding the use and form of a questionnaire to gather information from plaintiffs to inform an assessment of the viability of their claims, Judge Dalton observed that "we are . . . coming to common ground about the questionnaires in a reasonable time period."[43] In most other instances, the consensus is less explicit, but evident nonetheless.

Each judge brought his or her own experience and expertise to bear on the resolution of the various disputes that arose throughout the litigation. Individual predilections that emerge in the record of each judge's dialogue with counsel and colleagues usually gave way to consensus. The judges *collectively* engaged in the critical decisions affecting the larger litigation. And the collective action of the three, and later four, judge effort almost surely produced a more measured, deliberative

[42] *See* Transcript of Proceedings, *In re Engle Cases*, No. 3:09-cv-10000-J-WGY-JBT, Dec. 9, 2010, ECF No. 31; Transcript of Proceedings, *In re Engle Cases*, No. 3:09-cv-10000-J-WGY-JBT, at 2-45, June 8, 2011, ECF No. 171.

[43] *See* Transcript of Proceedings, *In re Engle Cases*, No. 3:09-cv-10000-J-WGY-JBT, at 37, June 8, 2011, ECF No. 171.

outcome at every phase of the litigation than would have been achieved by a single-judge court. No one judge had to think of everything every step of the way. No one judge appeared deferential to any other. Each appeared to have taken ample advantage of the opportunity to question and opine on the issues *sub judice*.

Although not always agreeing, displaying different styles and distinct personalities, the judges effectively complemented one other. The dynamic typically found at the appellate level was evident in the district court. The benefits of three-judge courts described by the commentators cited *supra*, were apparent throughout the *Engle* proceedings.

Not only did the judges' collaboration affect the court's decision-making process, it also impacted the court's interactions with counsel. Apart from the obvious—that more judges leads to more questions, more dialogue, more expression of thought and opinion—a single-judge court is often at a disadvantage, insofar as the lawyers typically have far greater command of the facts. Too, since the lawyers should have researched and studied the law applicable to their cases, they likely have superior legal knowledge. Judges, after all, are of necessity generalists. These disadvantages are magnified as the number of lawyers grows—and often MDL proceedings, especially multiple defendant MDLs, involve platoons of lawyers. The presence of multiple judges, however, tends to modulate the dynamic between bench and bar, shifting it back toward the court. While the ultimate power and authority

always resides with the court, whether single or multi-judge, this shift in dynamic is probably healthy for the process, rendering it more manageable for the court, muting the ability of any one side to advocate for an extreme outcome, restoring some of the balance present in individual cases.

CONCLUSION

The increasing shift away from class actions and toward multidistrict litigation has illuminated shortcomings in the MDL procedure that all stakeholders should seek to address. While the MDL process offers certain clear benefits in promoting consistent rulings, avoiding duplicative discovery, etc., parties, counsel, the courts should consider ways to improve the current system, particularly if the current trend toward greater MDL consolidation and global settlement continues. The use of a multi-judge court in multidistrict litigation, in the mold of that adopted in the *Engle* cases in the Middle District of Florida, would yield immediate, comprehensive benefits by, among other things, relieving the case management burdens currently borne by individual judges, promoting greater debate on critical issues before the MDL court thereby leading to a more rigorous development of the law, and a shared authority over the rights of numerous parties thrust together by the MDL procedure.